

# JONES, GALLIGAN, KEY & LOZANO, L.L.P.

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File No.: 37338

April 26, 2019

Honorable Horacio Peña, Jr., Esquire  
LAW OFFICE OF HORACIO PEÑA, JR.  
1926 E. Griffin Parkway, Suite 200  
Mission, TX 78572

VIA ELECTRONIC MAIL  
[REDACTED]

Re: City of Mission's Response to Your Request for Payment on any Unused  
Vacation and Sick Leave

Dear Mr. Peña,

As counsel for the City of Mission, we were asked to review your letter, dated April 10, 2019, wherein you requested that you be paid for an unused balance of vacation and sick leave, and to research the relevant law and policy manual applicable to your employment with the City. Based on our review and findings, the City has determined that you are not entitled to be paid for any vacation or sick leave that you may have accrued, if any, during your tenure as an assistant municipal court judge.

Texas law provides that vacation pay and sick leave pay are payable to an employee upon separation from employment *only* if (1) a written agreement with the employer or (2) a written policy of the employer specifically provides for payment. See Tex. Admin. Code § 821.25(a). This is where we began our analysis of your request.

## No employment contract between you and the City

First, a review of your employee personnel file reveals that you had not entered into a written agreement with the City of Mission providing for payment of vacation pay or sick leave pay. In fact, we have found no indication that you entered into any type of employment contract with the City of Mission. Your initial employment was authorized by a city council vote appointing you as a municipal court judge in 1987 and you received automatic renewals by operation of law thereafter. See Tex. Gov't Code § 29.005 (providing that municipal court judges automatically serve another full term of office when the appointing authority fails to take action in reappointing).

The initial employment document appears to be entitled Advice of Change and Authorization of Salary Payment. The date of employment is shown as April 6, 1987 and provides that you were not to receive any benefits except for social security. There are

hand written notes on the form that also indicate that the employee was not to receive vacation or sick leave. There does appear to be an undated note that was stapled on top of the initial employment form that was signed by the city manager and that gave instructions to add "H. Pena" as a salaried employee with standard benefits included. However, there is no mention of you earning the right to payments for any unused sick or vacation leave and there is no written contract. Also, the city charter provides that it is the city council that shall appoint the municipal court judge and determine the judge's salary. See Article 4.05, City of Mission Home Rule Charter. Your personnel file gave no indication that the city council ever provided the right to disbursements of any unused vacation or sick leave as a part of your salary with the City.

An employee change of status form, dated August 1, 2005, reveals that the city council approved your leave of absence to take a district bench in Hidalgo County from August 1, 2005 to December 31, 2006. The same form indicates that you are classified as a "Part-time Mun. Court Judge." Another employee change of status form, dated January 2, 2007, reveals that you were being re-hired and were coming off of your leave of absence. This form also indicates that you were a "regular part-time" employee.

The Personnel Policy Manual does not provide for payment of unused vacation or sick leave for part-time employees

After determining that there was no written agreement between you and the City of Mission, we next considered whether there is a written policy of the City that specifically provided for payment of any unused vacation or sick leave under your circumstances. See Tex. Admin. Code § 821.25(a). We discovered that there is no such policy.

As an employee with the City of Mission, you worked significantly less than 32 hours per week during the duration of your employment. Policy No. 200.03(A)(3) of the Personnel Manual defines a regular part-time employee as one who works less than 32 hours per work week and further notes that regular part-time employees are *not* eligible for City's benefits package, with the exception of holiday pay. (See Exhibit 1). Additionally, as per Appendix F of the Personnel Manual, only regular full-time employees are entitled to disbursements for any unused vacation or sick leave. (See Exhibit 2). In fact, the Personnel Manual provides that only regular full-time employees are entitled to the accrual of any vacation or sick leave. (See Exhibit 3). Therefore, because the Personnel Policy Manual specifically excludes part-time employees from the entitlement to disbursements for unused vacation or sick leave, you are not eligible to such.

We are aware that in previous policy manuals, part-time employees were once entitled to accrue pro-rata vacation hours. (See Exhibit 4). However, the City of Mission modified the policy manual effective October 1, 2012 and again in 2015, eliminating part-time employees as being eligible for accruing vacation/sick hours or for vacation/sick leave disbursement at the time of separation. (See Exhibit 5 and refer again to Exhibit 2). Texas case law provides that policy manuals that contain disclaimers regarding the plan being voluntary and subject to termination or modification, can indeed be unilaterally



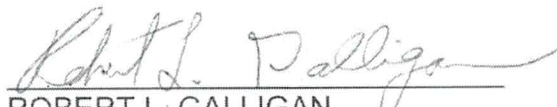
modified and do not create binding contracts with the employee.<sup>1</sup> Furthermore, Texas courts have noted a distinction between accruing vacation time and earning the right to be paid for unused vacation time upon termination.<sup>2</sup> As such, even if you did previously accrue vacation or sick leave as a part-time employee, that does not automatically give you the right to receive disbursements for the same. That right is determined by either a written agreement or a written policy of the City that would provide for that right. Under the current Policy Manual, which you last acknowledged and agreed to on December 5, 2018, you are not entitled to receive disbursements for any unused vacation or sick leave you may have accrued. (See Exhibit 6) (acknowledging that manual is not a contract nor a legal document and that you understand that the current Policy Manual supersedes and replaces all prior written and/or oral City personnel policies).

Based on the facts and the relevant law, the City of Mission has determined that you are not entitled to be paid for any vacation or sick leave that you may have accrued, if any, during your tenure as an assistant municipal court judge. This decision is based solely on the facts and the law. As a governmental entity, the City of Mission has an obligation to treat every employee fairly and equally and cannot ignore its own Policy Manual. This decision is meant to only address your request for payment on any accrued vacation and sick leave and does not affect your entitlement to any retirement funds earned in the Texas Municipal Retirement System.

We wish you the best of luck in your continued practice of law as an attorney and mediator at the Law Office of Horacio Peña, Jr. Please feel free to call or email me if you have any questions or would like to discuss this matter further. If you have information that was not addressed in this letter that you feel should be considered by me or the city council, please bring that to my attention so that it can be duly considered.

Very truly yours,

JONES, GALLIGAN, KEY & LOZANO, L.L.P.

By:   
ROBERT L. GALLIGAN  
Interim City Attorney  
City of Mission

AB:cja

Enclosures: As Stated.

xc: Randy Perez, City Manager

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<sup>1</sup> *Ryan v. Superior Oil Co.*, 813 S.W.2d 594 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

<sup>2</sup> *Brown v. Sabre, Inc.*, 173 S.W.3d 581 (Tex. App.—Fort Worth 2005, no pet.).